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September 17, 2020

Submitted via FOIAOnline

RE: Freedom of Information Act Request and Fee Waiver Request

Dear FOIA Coordinator:

This request is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and 15 C.F.R. pt. 4, on behalf of Ecological Rights Foundation (“EcoRights”). Consistent with its mission, EcoRights hereby requests copies of the following records¹ dated from January 1, 2018 to fulfillment of this request from the National Marine Fisheries Service (“NMFS”):

1. All records regarding any Endangered Species Act (“ESA”) consultation initiated from January 1, 2018 to present addressing the U.S. Environmental Protection Agency’s (“EPA”) rulemaking setting selenium standards for the State of California and/or the San Francisco Bay and Delta in the State of California. To be clear, this request refers to ESA consultation regarding the proposed rule discussed at 83 Fed. Reg. 64,059 (Dec. 13, 2018) and/or the proposed rule discussed at 81 Fed. Reg. 46,030 (July 14, 2016). This request also includes any requests to initiate consultation and/or any other similar records, even if they would be otherwise considered pre-consultation records.

EcoRights requests all records dated before fulfillment of this FOIA request. Please tender responsive records in digital format whenever possible.

* * *

Please identify and inform us of all responsive or potentially responsive records within the 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Wash. v. Federal Election Comm’n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA

¹ This request defines “records” broadly to include all documents, books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical
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establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA’s limited exemptions. *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Pub. L. No. 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. See *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. See *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

Presumption of Openness and “Foreseeable Harm” Standard

On his first full day in office President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract

fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable Harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, *available at* http://www.justice.gov/oip/foia_guide09.htm.

This presumption of openness was enshrined in law when Congress passed, and President Obama signed, the FOIA Improvement Act of 2016, Pub. L. No. 114-185, which added a new section to FOIA that states:

(8)(A) An agency shall –

(i) withhold information under this section only if –

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

5 U.S.C. § 552(a)(8).

Request for Fee Waiver

FOIA was designed to grant a broad right of access to government information, with a focus on the public's "right to be informed about what their government is up to," thereby "open[ing] agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA's fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that "[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

FOIA's fee waiver requirement is to be "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations such as EcoRights access to government documents without the payment of fees. As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA's waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

EcoRights, a non-commercial requester, hereby requests a waiver of all fees associated with this request because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.² Below, stated first in bold, are the criteria considered by NMFS under its regulations in assessing requests for fee waivers, followed by an explanation of EcoRights' satisfaction of those requirements. *See* 15 C.F.R. § 4.11.³ Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

(1) The subject of the request: whether the subject of the requested records concerns the operations or activities of the Government. The subject of the requested records must concern identifiable operations or activities of the

² Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

³ *See also Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att'y Gen.* (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm.

Federal Government, with a connection that is direct and clear, not remote or attenuated.

The requested records concern NMFS's implementation of the ESA. The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

- (2) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding.**

The requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities. The records requested will provide us with the ability to communicate to the public about NMFS's compliance with the ESA with regard to EPA's regulation of selenium. The actions and assessments of NMFS regarding these decisions and compliance activities are of concern to the public. Disclosure of the requested records will enhance the public's knowledge of these issues and support public oversight of federal agency operations. These records will also illuminate in a clear and direct way, the operations and activities of NMFS to fulfill important Congressional mandates under the ESA. There is a logical connection between the content of the records we have requested and the government's operations and activities related to protection of human health, ESA listed species, and the environment.

Furthermore, the information being requested is new. Although the full contents of the information requested are currently unknown to us, EcoRights does not request any documents previously provided to us by the government. The information EcoRights is requesting is not, to our knowledge, publicly available in its entirety. The government may omit sending us requested records that are available in publicly accessible forums such as on the internet or in published materials that are routinely available at public or university libraries so long as the government provides us with adequate references and/or website links so that we may obtain these materials on our own. However, the requested materials will otherwise not be available unless we receive them from the government in response to this FOIA request.

- (3) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to understanding of a reasonably broad audience of persons**

interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered.

Disclosure of the records will promote the understanding of the general public in a significant way because EcoRights will analyze the information and make its conclusions known to our members, other environmental groups nationwide, and the public at large via press releases, newsletters, and by posting our analyses of the information on one or more internet websites or citizen group email broadcast "systems." There has been significant national media attention related to EPA's regulation of selenium and its effects on the environment and ESA-listed species. The documents requested are expected to shed light on this. Because EcoRights has the intention to analyze these records and disseminate the contents to its membership and the public at large, this requirement is easily met.

These activities publicizing and distributing information received through FOIA requests demonstrate EcoRights' intention to disseminate the information to the public with the goal of disclosing material that will inform, or has the potential to inform, the public. *See also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument). EcoRights will use the information obtained through this FOIA request in the methods described herein, therefore it will contribute to "public understanding."

- (4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public's understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.**

Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate whether and to what extent NMFS has analyzed the effects of EPA's regulation of selenium on ESA-listed species and ensured that those actions do not jeopardize those species or adversely modify their critical habitat. In short, these records inform the public of EPA's and NMFS's compliance with these ESA with regard to EPA's regulation of selenium and the environmental and species-level impacts of those activities.

EPA's activities could have a significant impact on some of the nation's most imperiled species and their designated critical habitats. EcoRights has a demonstrated ability to disseminate the problematic features of government activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

EcoRights’ analyses will be disseminated via press releases as well as posted on EcoRights’ web site (<http://www.ecorights.org>) and likely the web sites of other environmental groups. EcoRights has a proven track record of obtaining press coverage of the environmental issues it publicizes. Generally, EcoRights obtains press coverage in the local and national media, including newspapers and radio stories. For example, EcoRights received significant press coverage in response to its eight-year legal battle with Pacific Gas and Electric Company (“PG&E”) to halt the discharge of toxic chemicals from PG&E’s utility poles into San Francisco and Humboldt Bays. This included stories in general circulation publications like the San Francisco Chronicle,⁴ environmentally-focused publications like the Beyond Pesticides Daily News Blog,⁵ general circulation legal industry publications like Bloomberg Law,⁶ and academic journals like the Environmental Law Review from Lewis & Clark Law School.⁷ As part of this litigation, EcoRights obtained a precedent-setting legal victory in the U.S. Court of Appeals for the Ninth Circuit, which earned its legal team a nomination for the 2019 Public Justice Trial Lawyer of the Year Award.⁸

⁴ “PG&E agrees in settlement to protect S.F. Bay from chemical runoff from utility poles,” San Francisco Chronicle (Sept. 11, 2018), *available at* <https://www.sfchronicle.com/science/article/PG-E-agrees-to-protect-S-F-Bay-from-chemical-13221486.php#photo-12306742> (last visited Sept. 23, 2019); “Settlement in Lawsuit Over Cancer-Causing Dioxin Runoff from PG&E Utility Poles,” CBS SF Bay Area (Sept. 11, 2018), *available at* <https://sanfrancisco.cbslocal.com/2018/09/11/settlement-in-lawsuit-over-cancer-causing-dioxin-runoff-from-pge-utility-poles/> (last visited Sept. 23, 2019); “PG&E Agrees to Settlement to Reduce Dioxin Runoff into Bays, Waterways,” SFGate (Sept. 11, 2018), *available at* <https://www.sfgate.com/news/bayarea/article/Pg-E-Agrees-To-Settlement-To-Reduce-Dioxin-Runoff-13222439.php> (last visited Sept. 23, 2019).

⁵ “Settlement Reached in Lawsuit Over Dioxin Contamination from Poison Poles in Central California,” Beyond Pesticides (Sept. 14, 2018), *available at* <https://beyondpesticides.org/dailynewsblog/2018/09/settlement-reached-in-lawsuit-over-dioxin-contamination-from-poison-poles-in-central-california/> (last visited Sept. 23, 2019).

⁶ “PG&E Settles Suit Over Leaching Utility Poles,” Bloomberg Law (Sept. 12, 2018), *available at* <https://news.bloomberglaw.com/product-liability-and-toxics-law/pg-e-settles-suit-over-leaching-utility-poles> (last visited Sept. 23, 2019); “Ninth Circuit Paves Way for Regulation of Stormwater Discharges Under RCRA,” Perkins Coie legal update (Nov. 7, 2017), *available at* <https://www.perkinscoie.com/en/news-insights/ninth-circuit-paves-way-for-regulation-of-stormwater-discharges.html> (last visited Sept. 23, 2019).

⁷ Case Note, *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 874 F.3d 1083 (9th Cir. 2017), *Environmental Law* (2017), *available at* <https://elawreview.org/case-summaries/ecological-rights-foundation-v-pacific-gas-electric-co-874-f-3d-1083-9th-cir-2017/> (last visited Sept. 23, 2019).

⁸ See <https://www.publicjustice.net/trial-lawyer-year-award/> (last visited Sept. 23, 2019).

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.

EcoRights is a community-based educational nonprofit corporation committed to the protection, preservation, and restoration of the environment and endangered and threatened species. Incorporated in 1997, EcoRights has been devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment for over 20 years. To further EcoRights' environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Accordingly, EcoRights has no commercial interest in the information requested. EcoRights seeks the information solely to determine the effects of EPA's regulation of selenium on ESA listed species and the environment and whether EPA and NMFS have adequately considered those effects. This has serious implications for these species, their habitat, and the environment more generally. This information will therefore aid in EcoRights' efforts to advocate that the appropriate state, federal, or private entities take needed actions to protect our environment, wildlife, and natural resources.

EcoRights has no financial interest in the information sought or any enforcement actions that may result. EcoRights' goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that EPA and NMFS are operating in such a way that they will protect, and contribute to the protection of, public health, wildlife, and the environment.

(6) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

EcoRights has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, EcoRights respectfully requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11 for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

In the event that your Agency denies EcoRights a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of \$25.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day statutory deadline is also applicable to EcoRights' fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

Please direct all correspondence and responsive records to:

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Thank you for your attention to this request. If you have any questions about the requested records or the requested fee waiver, please do not hesitate to contact me at the phone or email below.

Sincerely,

/s/ Stuart Wilcox
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